

EXHIBIT 10

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIV: GENERAL EQ. PART
ESSEX COUNTY
DOCKET NO.: C-25-21
A.D. # _____

GURBIR S. GREWAL, the New)	
Jersey Attorney General,)	
KAITLIN CARUSO, acting)	
director of New Jersey)	
Division of Consumer)	TRANSCRIPT
Affairs,)	OF
)	ORDER TO SHOW CAUSE
Plaintiff,)	
)	
vs.)	
)	
SMITH & WESSON SALES)	
COMPANY, INC.,)	
)	
Defendant.)	

Place: Essex County
Wilentz Justice Complex
(Heard via Zoom)

Date: May 27, 2021

BEFORE:

HONORABLE JODI LEE ALPER, P.J.Ch.

TRANSCRIPT ORDERED BY:

AMANDA LAUFER CAMELOTTO, ESQ.,
(DLA Piper, LLP)

APPEARANCES:

MAYUR SAXENA, ESQ.
(Assistant Attorney General)
Attorney for Plaintiffs

COURTNEY SALESKI, ESQ.
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I N D E X

ORDER TO SHOW CAUSE:

ARGUMENTS:

BY: Mr. Saxena.....4, 32

BY: Ms. Saleski.....18, 48

THE COURT:

Decision.....to be rendered

1 (Hearing commenced at 10:11 a.m.)

2 THE COURT: Good morning. This is the matter
3 of Gurbir Grewal, the Attorney General of the State of
4 New Jersey, and Kaitlin Caruso, acting director of the
5 New Jersey Division of Consumer Affairs versus Smith &
6 Wesson. The matter is filed under docket number C-25-
7 21. I'm Judge Jodi Lee Alper. I sit in the Essex
8 County Chancery Division. Today is May 27th, 2021.
9 And it is 10:12 a.m. May I please have appearances of
10 counsel starting with plaintiff's counsel. Please
11 spell your last names.

12 MR. SAXENA: Good morning, Your Honor.
13 Assistant Attorney General Mayur Saxena, that's S like
14 Sam, A-X like x-ray E-N like Nancy A, for plaintiffs
15 and movants.

16 THE COURT: Thank you. Good morning Mr.
17 Saxena. And now may I please have appearance of
18 counsel for the defendant.

19 MS. SALESKI: Good morning, Your Honor. This
20 is Courtney Saleski, S-A-L-E-S-K-I on behalf of Smith &
21 Wesson. I believe some of my colleagues are on as well
22 also on behalf of Smith & Wesson. I will ask if they
23 will identify themselves as well if they can Your
24 Honor.

25 THE COURT: Well they can, they don't have

1 to. You'll be the only one arguing. But certainly if
2 you wish to have their appearances noted, we can do
3 that.

4 MS. SALESKI: That's not necessary then, Your
5 Honor. It will only be me arguing, thank you.

6 THE COURT: Very good, thank you then. And
7 welcome everybody. The matter comes before the Court
8 on an Order to Show Cause which was filed on behalf of
9 the Attorney General essentially to enforce a subpoena
10 which was filed pursuant to the New Jersey Division of
11 Consumer Affairs, the Consumer Fraud Act, and a cross
12 motion to dismiss or quash, or stay the subpoena.

13 I will hear first from the Attorney General
14 please on your enforcement action and then I will hear
15 from the defendant on your cross claim or counterclaim
16 and then I will give Mr. Saxena another opportunity to
17 speak.

18 MR. SAXENA: Thank you, Your Honor. May it
19 please the Court, I'll start with a brief introduction
20 before turning to the three points I would like to
21 address today. The key facts in this subpoena
22 enforcement proceeding are undisputed. The New Jersey
23 Division of Consumer Affairs and the Attorney General
24 served a subpoena on Smith & Wesson in October 2020.
25 The State served that subpoena pursuant to it's broad

1 authority to investigate whether Smith & Wesson is
2 engaging in deceptive advertising in violation of the
3 New Jersey Consumer Fraud Act.

4 The subpoena seeks production of documents
5 and has standard document requests that are routinely
6 used in the State's deceptive advertising
7 investigations. For example, the first document
8 request seeks copies of Smith & Wesson's
9 advertisements. And subsequent requests seek documents
10 in Smith & Wesson's possession that substantiate or
11 disprove factual claims made in those advertisements.

12 Smith & Wesson has failed to obey the
13 subpoena, has not produced any documents to date, and
14 has made no effort to meet and confer with the State to
15 discuss its objections. Instead, the very next day
16 after sending the State a letter objecting to the
17 subpoena Smith & Wesson challenged the subpoena in
18 federal court.

19 Based on these facts which cannot be
20 meaningful disputed, the State seeks and order
21 directing Smith & Wesson to comply with the subpoena.

22 I would like to express three points to
23 explain why the subpoena should be enforced, and why
24 Smith & Wesson Constitutional objections lack merit.
25 First, the plain language of the subpoena shows that

1 the State seeks documents directly relevant to it's
2 deceptive advertising investigation under the CFA. And
3 this fact alone defeats Smith & Wesson's main
4 objections under the First and Fourth Amendments.

5 Second, nearly all of Smith & Wesson's
6 Constitutional objections are premature and cannot be
7 adjudicated at this early subpoena enforcement stage.
8 And Smith & Wesson's narrow fall-back objection that
9 the mere production of documents will itself violate
10 constitutional privacy rights has no application here.

11 And third, there is no reason to stay these
12 proceedings, Your Honor, in this Court which is the
13 natural forum for subpoena enforcement as expressly
14 designated by the Consumer Fraud Act. And especially
15 not for Smith & Wesson's preemptive strike suit in
16 federal court.

17 To begin, it's important to be clear about
18 what exactly the State's subpoena seeks to investigate.
19 Smith & Wesson argues that the subpoena is improperly
20 aimed at investigating it's "advocacy of opinions that
21 firearms are a useful or a good choice for self-
22 defense." But that is just not the subpoena the State
23 served. Simply reading the subpoena document requests
24 reveals that the State is not concerned with Smith &
25 Wesson's advocacy or it's opinions. But rather, with

1 whether the company's factual claims in its advertising
2 are misleading. The actual subpoena served by the
3 State is much more limited than the strawman Smith &
4 Wesson attacks as an unconstitutional overreach.

5 More specifically, the State's subpoena is
6 directly targeted to investigate two potential CFA
7 violations. The first is that Smith & Wesson's
8 advertising may violate the CFA and it's regulations by
9 marketing firearms to consumers for the purpose of
10 concealed carry without making disclosures required by
11 regulations. Namely, a cleaner and conspicuous
12 disclosure that concealed carry of a firearm is
13 unlawful without a permit in New Jersey.

14 The key requests seeking documents relevant
15 to that potential violation are requests one and two
16 which seek copies of the advertisements and request 4A
17 and B, which seek documents concerning specific types
18 of claims that might be made in advertisements
19 marketing firearms for concealed carry.

20 The second potential violation being
21 investigated is that the company's advertisement may
22 mislead consumers regarding the safety, effectiveness,
23 or benefits of owning a Smith & Wesson firearm. The
24 key requests here are once again requests one and two,
25 which enable us to review the advertisements and assess

1 the factual claims made therein. And requests three,
2 four, and six, which seek studies, risk assessments and
3 other documents in Smith & Wesson's possession that
4 support or disprove the factual claims made in the
5 advertisements. These include claims about safety,
6 effectiveness, or benefits of Smith & Wesson firearms
7 for self-defense, home-defense, or even just when
8 compared to other firearms.

9 In short, the subpoena investigates deceptive
10 advertising by requesting copies of advertising, and
11 then by requesting documents in Smith & Wesson's
12 possession that may evidence deception. This is a
13 tried and true model that the Division has routinely
14 used to investigate deceptive advertising in many
15 different contexts, including advertising of airbags,
16 opioids, medical devices and also firearms, all of
17 which are equally subject to the Consumer Fraud Act.

18 Just this week Judge Paganelli granted
19 summary judgment to the State in a litigation springing
20 from similar subpoena holding that certain
21 advertisements for large-capacity ammunition magazines
22 violated the CFA and its regulations. That's Grewal v.
23 22 Mods for All Incorporated, Your Honor.

24 The fact that the State's subpoena does in
25 fact seek to investigate deceptive advertising is fatal

1 to Smith & Wesson's main Constitutional defenses.
2 Smith & Wesson's entire argument hinges on establishing
3 that the subpoena does not seek to investigate
4 deceptive advertising, and instead was issued solely
5 for the improper purpose of punishing the company.

6 For example, Smith & Wesson argues that the
7 State is engaging in viewpoint discrimination, but the
8 First Amendment doesn't prohibit a subpoena directed at
9 deceptive advertising which is not a protected
10 viewpoint. Investigating fraud is not viewpoint
11 discrimination against fraudsters.

12 Smith & Wesson also argues that the State's
13 investigation is an unlawful search and seizure, but
14 the Fourth Amendment permits an administrative subpoena
15 on mere suspicion that the law has been violated. And
16 it requires only that the subpoena document request be
17 reasonably directed at a legitimate purpose and that
18 standard is easily met.

19 Smith & Wesson bases several additional
20 constitutional objections on it's argument that the
21 State issued the subpoena and now seeks to enforce it
22 based on an improper and retaliatory motive. But of
23 course there's zero plausible allegations of this as
24 detailed at pages 24 and 25 of our opposition brief,
25 and certainly no allegations that would overcome the

1 strong presumption of regularity that a prosecutor has
2 legitimate grounds for the action that he takes.

3 But importantly, even assuming that Smith &
4 Wesson's assertions are true, they still fail to meet
5 the extremely high standard here, which requires
6 showing that the investigation has objectively no
7 independent law enforcement justification and was
8 brought even though the Attorney General knew this and
9 knew there was no violation of law.

10 The standard is high because as the Supreme
11 Court said in Hartman v. Moore, "a party can inflict a
12 public officer with disruption and expense by alleging
13 nothing ore in practical terms, than actually with a
14 retaliatory animus, a subjective condition too easy to
15 claim and too hard to defend against." That's what
16 Smith & Wesson has tried unsuccessfully to do here,
17 Your Honor.

18 Moving to my second point, Smith & Wesson's
19 remaining Constitutional defenses are premature and
20 cannot be adjudicated at this early stage. Smith &
21 Wesson argues that courts routinely adjudicate
22 Constitutional objections before requiring the
23 production of documents, but that's not correct. They
24 actually had it backwards. Adjudicating Constitutional
25 issues before requiring compliance with the subpoena is

1 a narrow exception and not the rule.

2 Because we're still at the subpoena
3 enforcement stage, all Smith & Wesson needs to do right
4 now is produce responsive documents. After the
5 Division receives that documents it may file an action
6 to the CFA or it may conclude that no violation has
7 occurred. So any Constitutional defense that is
8 premised on the State actually applying the CFA to
9 Smith & Wesson is necessarily premature and cannot be
10 adjudicated until a specific claim is actually brought.
11 Nearly all of Smith & Wesson's challenges are as
12 applied Constitutional challenges, but no law has
13 actually been applied to any advertisement yet.

14 For example, Smith & Wesson argues that the
15 subpoena seeks to investigate only non-actionable
16 opinion or puffery, but that argument is entirely
17 hypothetical at this point, because we don't yet know
18 what advertisements will be at issue, let alone which
19 specific statements might violate the CFA. There is no
20 basis at this stage to conclude that Smith & Wesson's
21 advertising contains no factual claims or only opinion
22 or puffery. And we certainly can't be expected to take
23 their word for it. This is especially the case when
24 the City of Gary, Indiana asserted that deceptive
25 advertisement claim against Smith & Wesson based on

1 factual representations about produce safety and claim
2 survived a motion to dismiss for failure to state a
3 claim.

4 As to the Fourth Amendment, similarly Smith &
5 Wesson insists that the State not only show that the
6 subpoena is reasonably related to a legitimate purpose
7 which we've done, but also must proffer exactly what
8 "specific affirmative statements will support the
9 State's hypothetical CFA claims in the future." And we
10 have to do this without the benefit of any discovery.
11 So initially the CFA doesn't even require affirmative
12 statements to prove a violation, because it embraces
13 knowing omissions and unconscionable commercial
14 practices.

15 But in any case what Smith & Wesson demands
16 is futile, because the State can't intelligently assess
17 without the benefit of document production what our
18 claims will ultimately be, or whether we're even going
19 to bring claims at all.

20 You know, finally Smith & Wesson argues that
21 the disclosure requirements of the regulations
22 underlying the CFA unlawfully compel speech when
23 they're applied to firearms advertisements. Again,
24 this is premature, Your Honor. Smith & Wesson first
25 has to produce the advertisements, and then only if the

1 regulations are applied can it challenge the
2 application. But in any case, even on the merits, the
3 government compels speech all the time, like the
4 Surgeon General's warning on cigarettes or disclaimers
5 that terms or conditions may apply in certain states.

6 So the authorities that Smith & Wesson relies
7 on actually recognize these well-established exceptions
8 for uncontroversial informational disclosures to
9 consumers about the products that they're buying, like
10 the disclosures that are required under the
11 regulations, consumers like to know that the product
12 they are buying is unlawful to possess absent certain
13 circumstances.

14 So given that most of their arguments are
15 premature at this stage, in it's reply brief Smith &
16 Wesson has turned to a fallback argument, which asserts
17 that the mere production of documents itself will
18 infringe on the Company's First Amendment Rights. And
19 they rely heavily on NAACP versus Alabama, and two
20 other McCarthy era cases. All of which address a
21 narrow issue that is just not present here, whether to
22 enforce a subpoena seeking membership lists for the
23 purpose of revealing the identity of suspected
24 communists or other alleged subversive actors.

25 In that unique situation, certain courts have

1 struck down subpoenas before requiring production of
2 documents. But they've done so where the identifying
3 information sought was (a) not relevant to the
4 investigation; and (b) the disclosure would itself have
5 a chilling effect and thus infringe on associational
6 privacy under the First Amendment.

7 Those are the facts in NAACP, in Gibson and
8 also in Sweezy the main cases that Smith & Wesson
9 relies on. The remaining cases have similar privacy
10 issues at stake. And importantly, these are the only
11 cases cited by Smith & Wesson where a Court actually
12 quashes a subpoena before requiring document production
13 based on Constitutional objections.

14 But the State subpoena here just doesn't seek
15 that type of information. It doesn't seek membership
16 lists or private or sensitive information from
17 individuals so it can't threaten infringement of Smith
18 & Wesson's privacy interest at all. Smith & Wesson
19 certainly can't assert those types of interests in its
20 advertising which is already public, or in you know
21 studies or analyses relating to claims made in its
22 advertising.

23 One final note on this before I move to the
24 third point on stay, Your Honor, Smith & Wesson has
25 raised additional objections in its opening brief,

1 including under the Second Amendment and the due
2 process and equal protection clauses, but it abandoned
3 those and did not address it in their reply brief, and
4 made no rebuttal of the arguments in the State's
5 opposition brief. So we would simply stand on those
6 arguments and we respectfully submit that Smith &
7 Wesson can't raise new arguments for the first time at
8 this hearing.

9 Then for my third point, Your Honor, I will
10 address why a stay is not warranted here. Our
11 opposition brief details why application of the First
12 Filed Rule is not appropriate here. That's because
13 there are important special equities involved. Those
14 include the State's strong interest in protecting
15 consumers from potential ongoing fraud or deceptive
16 advertising, which the legislature made a priority when
17 it enacted the CFA, one of the strongest Consumer
18 Protection Laws in the country.

19 They also include the State's ability to
20 obtain prompt relief when a party disobeys one of it's
21 (indiscernible). Consumer protection investigations
22 under the CFA would mean very little if the State's
23 subpoenas cannot be effectively enforced.

24 And the special equities include Smith &
25 Wesson's attempt at jurisdiction shopping here,

1 especially because their preemptive strike suit in
2 federal court was filed without even an attempt to meet
3 and confer with the State over any objections. And the
4 filing of the suit precluded the State from being the
5 first to file a subpoena enforcement action in this
6 court.

7 The State is the natural plaintiff here and
8 this Court is the natural forum. In fact, it's
9 designated as such under the CFA at 56:8-6 which
10 requires that any motion to enforce the subpoena has to
11 be filed with the Superior Court. So for these reasons
12 granting a stay would be unjust. And frankly, it would
13 not harm Smith & Wesson at all if this proceeding moves
14 forward.

15 I'll add one more thing on the stay, Your
16 Honor, before wrapping up. One of the purposes of the
17 First Filed Rule is to avoid needless use of judicial
18 resources. But if this Court were to accept Smith &
19 Wesson's arguments and to stay the action it would
20 create a perverse incentive for any party who receives
21 a subpoena from the State, to follow Smith & Wesson's
22 lead. Instead of meeting and conferring, and
23 attempting to resolve disputes, and then only if
24 necessary moving to quash in this Court, everyone would
25 race to federal court like Smith & Wesson did here with

1 a preemptive strike suit to trigger the First Filed
2 Rule. If that were the law it would discourage meet
3 and confer, which frankly, might have avoided this
4 litigation since Smith & Wesson appears to have badly
5 misunderstood what the State's subpoena seeks to
6 investigate. And it would create duplicative
7 litigation and delay any subpoena enforcement until the
8 ultimate resolution of whatever federal action was
9 filed.

10 Smith and Wesson concedes here that the
11 federal proceeding could take months if not years to
12 resolve, especially since they've withdrawn their
13 request in the federal action for expedited relief. So
14 inflexible application of the First Filed Rule would
15 basically disregard all of these special equities and
16 it would vitiate the Attorney General's ability to
17 properly enforce subpoena.

18 We recommend to the Court that our Supreme
19 Court's decision in Sensient Colors on this as well as
20 the Massachusetts Supreme Court decision in the Exxon
21 case both of which declined to stay actions in favor of
22 similar preemptive strike suits.

23 So for those reasons, Your Honor the Division
24 and the Attorney General respectfully the Court denies
25 Smith & Wesson's motion to stay and motion to quash and

1 enforce the State's subpoena. I'm happy to answer any
2 questions that you have.

3 THE COURT: Thank you, Mr. Saxena. I have no
4 questions at the moment. But I will reserve my right
5 to ask them on your reply argument. I'll hear now
6 please from counsel for Smith & Weston -- Wesson I'm
7 sorry, Ms. Saleski.

8 MS. SALESKI: Good morning, again Your Honor.
9 May it please the Court, from our view this is
10 procedurally a simple case. This Court should stay the
11 matter pending the outcome of the First Filed Federal
12 matter, as it's articulated in cases like the New
13 Jersey Supreme Court case Sensient.

14 This subpoena and the related federal action
15 and this enforcement action present important issues
16 regarding among other this First Amendment speech, and
17 in this case disfavored political speech. But Your
18 Honor doesn't need to and shouldn't decide the
19 Constitutional and Federal issues right now. And that
20 is because the proper course here is to stay, which I
21 would like to address first.

22 But even if the Court decided not to stay,
23 the Court must dismiss the complaint and quash the
24 subpoena because the AG has failed to meet his burden
25 to show that the subpoena is reasonably related to a

1 legitimate purpose and the subpoena cannot pass
2 Constitutional scrutiny. I would like to address that
3 second if that's okay with the Court.

4 Starting the stay, the Court should follow
5 the First Filed Rule here. The proper course under
6 comity principles is not to exercise jurisdiction, but
7 to adhere to the general rule that the Court which
8 first acquires jurisdiction has precedence in the
9 absence of special equities. The AG does not dispute
10 that in briefing or here before the Court that the
11 First Filed Rule requirements are met. Instead the AG
12 tries to demonstrate two compelling special equities
13 that he argues militates against the stay.

14 But he fails to show that such equities here
15 and thus cannot overcome the First Filed Rule. It's
16 worth noting the circumstances hereto especially
17 because this argument we're hearing about how a meet
18 and confer would've been effective under these
19 circumstances. That is the federal action was filed
20 two months before this one. The AG is actively
21 participating in that action. The AG has offered no
22 reason for the delay in filing this action. There's a
23 tolling agreement in place with respect to the AG's
24 potential CFA claims. And he sought and was granted
25 extensions in both courts.

1 There's just no need to proceed today at the
2 speed which the AG requests under these circumstances
3 and we know that from the AG's own conduct. This is
4 the first time that the AG has argued that prompt
5 relief is a special equity. It's not. But under the
6 circumstances if the AG needed prompted relief, he
7 should not have waited two months to file this action.
8 With regards to his special equity arguments that he
9 has in fact raised, first there's forum shopping.

10 The AG argues that this was forum shopping,
11 but cites absolutely no analogous case to support that
12 accusation. That's because there is no analogous case.
13 Forum shopping generally is when you file an
14 inappropriate forum or one with little to no contacts
15 to avoid a less favorable jurisdiction. An example is
16 the Supreme Court -- the New Jersey Supreme Court case
17 of Heavner which was cited in a case we cited
18 Performance Motor Cars, that's a good example because
19 in that case the plaintiffs filed in New Jersey to try
20 to get the benefit of New Jersey Products Liability
21 Law. But they were North Carolina residents. They
22 bought their car in North Carolina. They had a car
23 accident in North Carolina. And that was all the facts
24 that formed the basis of their actions. They just
25 wanted to get to New Jersey to use New Jersey's

1 Products Liability Law. That's forum shopping.

2 Filing in Federal Court in New Jersey, a
3 federal action wasn't forum shopping. It was a filing
4 of a well-founded complaint raising constitutional and
5 federal statutory issues in an appropriate court. For
6 similar reasons this was not a First Strike maneuver.
7 It was an appropriate time supporting by the cases that
8 we cite in our brief like Louisiana Debating and Teleco
9 Communications to bring a pre-enforcement
10 Constitutional Challenge to Federal Court.

11 No action by the AG was imminent. As we know
12 they didn't file two more months after Smith & Wesson
13 filed. And there was no bad faith here. In fact, the
14 AG doesn't even make a showing, or attempt to make a
15 showing that this was somehow bad faith. As the New
16 Jersey Supreme Court noted in Sensient the first strike
17 maneuver is about bad faith.

18 The second special equity that the AG tries
19 to establish is a compelling a state interest. But the
20 AG's argument that there is a compelling state interest
21 in rooting out consumer fraud doesn't add to the
22 equities analysis. As the cases he cites and the
23 Courts recognize the special equity requires a showing
24 that the proceeding in another jurisdiction would
25 contravene that policy. The AG doesn't even argue that

1 the resolution of the federal claims in federal court
2 before proceeding in this court would undermine the
3 policy of consumer protection in New Jersey. And
4 that's because it wouldn't.

5 Smith & Wesson has entered into a tolling
6 agreement under the AG, such that if the subpoena and
7 the investigation survive federal and constitutional
8 scrutiny no prejudice will result from the delay. The
9 Court's comity inquiry is an inquiry about weighing the
10 interests of the parties and the interests of the
11 judiciary. It would be a waste of resources to have
12 these cases go forward at the same time. And there
13 would be no harm to any interest of the AG in allowing
14 resolution of the federal case to proceed first. Under
15 those circumstances, a stay is appropriate here for
16 comity reasons.

17 Even if the Court were not to stay, if the
18 Court determined that it was not appropriate under the
19 First Filed Rule, then it's our position that the Court
20 must dismiss the complaint or quash the subpoena.
21 That's because the AG has not met his burden to show
22 that the subpoena is reasonably related to a legitimate
23 purpose and cannot -- that subpoena cannot otherwise
24 survive Constitutional scrutiny.

25 First, Smith & Wesson has raised multiple

1 constitutional challenge -- challenges to the subpoena
2 any one of which would invalidate the subpoena.
3 There's absolutely no merit to the idea that you can
4 compel disclosure without resolving the First Amendment
5 and other claims first.

6 In the argument for the first time, we hear
7 the AG saying that only McCarthy era cases approach
8 Constitutional issues and subpoena context this way.
9 That's simply not the case. For example, a case cited
10 by the AG which is EEOC versus U PENN, Third Circuit,
11 recognized that it was appropriate to address the First
12 Amendment issues in the subpoena enforcement action.
13 Other cases do the same.

14 In fact, the Supreme Court has specifically
15 recognized that the power of compulsory process must be
16 carefully circumscribed when the investigative process
17 tends to impinge upon such highly sensitive areas as
18 freedom of speech. That's Sweezy.

19 The first -- so there are many examples of
20 cases invalidating subpoenas on First Amendment and
21 other Constitutional grounds. Another one that's not
22 from McCarthy era is Local 1814 International
23 Longshoremen Association that we cited in our brief.

24 Similar to that case here, we have the AG's
25 viewpoint discrimination in issuing this subpoena

1 requires the subpoena to be invalidated. Viewpoint
2 discrimination requires a showing that the government
3 -- of the government targeting speech when the specific
4 motivating ideology or the opinion, or perspective of
5 the speaker is the rationale for the restrictions on
6 speech. In other words, the test for viewpoint
7 discrimination is whether the government has singled
8 out a subset of messages for disfavor based on those
9 views expressed.

10 Smith & Wesson is part of a disfavored
11 industry and is being attacked for engaging in
12 disfavored speech. The Attorney General has singled
13 out those views for disfavor and has now named them
14 fraud. It is a commonsense that we wouldn't even be
15 here if Smith & Wesson was on the other side of the
16 AG's disfavored political speech. And that is
17 resulting in speech that the AG disfavors being
18 chilled.

19 The AG has allied himself with Anti-Second
20 Amendment Activists. He's hired lawyers to coordinate
21 with those activists. Those are the same groups that
22 have been shopping around as marketing fraud period of
23 AG's is a way to get documents to build cases. There
24 are public reports that have revealed that the goal of
25 these approaches is to obtain documents to use what

1 they call impact litigation to attack firearms'
2 manufacturers, not to prosecute any fraud.

3 The AG has told the public that he's turning
4 up the heat on gun manufacturers. The AG has touted a
5 naming and shaming program that unfairly tries to link
6 firearms manufacturers with third party criminal
7 activity. Not only are these public implications of
8 viewpoint discrimination. The viewpoint discrimination
9 is evident in the very subpoena and the arguments made
10 by the AG's briefing.

11 The Attorney General now seeks to curb Smith
12 & Wesson's speech by labeling it's opinions as fraud in
13 an attempt to chill Smith & Wesson's speech going
14 forward. For example, enhancement of one's lifestyle
15 through firearms ownership is something that AG says he
16 is investigating as potential fraud. A statement like
17 that cannot be fraud. If this were an issue on the
18 other side of the political spectrum, like for example
19 if the AG said he wanted to investigate a women's
20 clinic regarding statements that abortion enhanced
21 one's lifestyle, I don't think we would be here having
22 this debate at all.

23 This is also so clearly opinion. And in our
24 case, today it's disfavored opinion. And that's why
25 it's so important to scrupulously police viewpoint

1 discrimination. Right now, it's my client's industry
2 that is disfavored and whose political speech is being
3 targeted. But some day soon it could be another. And
4 this subpoena is viewpoint discrimination based on
5 disfavored speech making it unconstitutional and
6 unenforceable.

7 In addition, the AG has failed to show the
8 subpoena is reasonably related to a legitimate purpose.
9 It's not enough to just say that he wants to
10 investigate fraud, especially in the context of
11 constitutional issues. Each request seeks documents
12 regarding protected First Amendment opinions about
13 Second Amendment issues that cannot form the basis of
14 fraud. And therefore, the subpoena cannot meet the
15 standard articulated in Greenblatt and the other cases
16 that he's cited and we've cited.

17 He has suggested that his requests fall into
18 two categories. I will start with his second first,
19 that's how they appeared in the briefing. His second
20 is the one he said was second today, that category was
21 repress regarding whether the company engaged in
22 deceptive advertising regarding products safety
23 benefits and effectiveness. We should all start by
24 recognizing that we aren't talking about a typical
25 product safety issue here. We're talking about

1 firearms. That makes this case unique. Firearms are a
2 unique product. There is a lot of political discourse
3 around firearms and people have strong beliefs on both
4 sides.

5 They are also a unique product because they
6 can be dangerous and everyone knows that. But firearms
7 are protected in a Constitutional way. The Second
8 Amendment and the Supreme Court recognized and enshrine
9 a policy that Americans are entitled to bear firearms
10 for their safety and protection. So advertisements
11 that state the same just cannot be fraudulent.

12 And the AG's subpoena in main asks for
13 documents that regards opinions like that that could
14 never form the basis of fraud actions. For example,
15 the AG talked about whether concealed carry of a
16 firearm enhances one's lifestyle. It's not really
17 clear what that even means. But there's no conceivable
18 way that meets New Jersey's requirement that statements
19 constitute fraud must be a misrepresentation of fact
20 not an opinion on your puffery.

21 Then there's other things like whether
22 something is safer, like confronting a threat he wants
23 documents related to that. Safer is an opinion in this
24 context and it's certainly situational. It's not a
25 presently existing quantifiable provable fact capable

1 of exact knowledge at the time made. That language
2 comes from the Cigna case. And that's the standard.

3 Where the request involves safety, self-
4 defense, protection, in particular self-defense in the
5 home, like his request in 4D, E, and F in the subpoena,
6 Supreme Court precedent like Heller and the Second
7 Amendment itself has usurped that policy decision the
8 AG wants to make here. He wants to say that people are
9 less safe or less protected with firearms. But that's
10 not a decision for him because in Heller the Supreme
11 Court recognized that citizen has a right to carry arms
12 in defense of his property or person and to use them if
13 either were assailed with such force, numbers, or
14 violence as made it necessary for protection or safety
15 of either.

16 The Second Amendment speaks to security as
17 the reason for it's existence. So statements speaking
18 to a Constitutionally enshrined policy decision and
19 rights cannot constitute fraud. Heller recognized the
20 enshrinement of Constitutional Rights necessarily takes
21 certain policy choices off the table.

22 These things really cannot be proven false.
23 That's why the cases cited by the AG to support his
24 inquiry do not provide any support. As we mentioned in
25 our brief, he cites things like Leon versus Rite Aid

1 Corp to say that he's allowed to investigate such
2 things. But in that case he was talking about how Rite
3 Aid advertised merchandise at prices and said that they
4 were the lowest prices. That's quantifiable, that's
5 provable. That's not opinion. Those types of cases
6 add nothing here for the Court's analysis and are just
7 not the same.

8 The second category, which today the AG
9 addresses the first, is the failure to disclose
10 products marketed are unlawful to possess without a
11 permit. This is the only specific allegation that the
12 AG has relied on to try to justify the subpoena. This
13 hazardous product regulation which the AG contends
14 requires advertisers to inform New Jersey Consumers of
15 the need for a permit, seems to only have ever been
16 applied in two cases as far as I can tell or been able
17 to tell before today. One in a recent settlement by
18 the AG's office relating to illegal firearms called
19 Ghost Guns and the other in this case. I am not sure
20 if it's in the next case that the AG just mentioned,
21 but that case also involved illegal firearms that could
22 not be legally sold here in New Jersey.

23 But we know from the briefing here that the
24 AG's theory is that if Smith & Wesson's advertisements
25 available to New Jersey residents did not include a

1 statement that concealed carry requires a permit in New
2 Jersey then the AG thinks this is fraud. And we should
3 note despite that the regulation potentially could be
4 applicable to every other industry that somehow
5 requires permits and licensing, like driving cars, or
6 selling liquor, et cetera, there's no other example of
7 the AG using that regulation.

8 In fact, driving a car requires a license in
9 New Jersey. And if you drive without a license that is
10 a criminal offense, so this would fit right into that
11 statute. But the AG is not targeting any auto maker
12 whose ads are all clearly available to New Jersey
13 residents but don't include that fact. We know why.
14 It's because the more -- this is more evidence of
15 viewpoint discrimination and it's because the AG wants
16 to turn up the heat on gun manufacturers. But it is
17 also evidence of how the AG has not and cannot
18 articulate a legitimate purpose for the subpoena and
19 investigation because it's not targeting fraud and
20 false statements. It's targeting opinions expressed in
21 national advertisements of a disfavored industry with
22 which he disagrees.

23 We've described also in detail in our
24 briefing why this regulation cannot be constitutionally
25 abide to Smith & Wesson because it unconstitutionally

1 compels speech. So even were the Court to apply the
2 most lenient standard in evaluating this, that's the
3 Central Hudson case, it would still have to evaluate
4 whether the notice requirement was narrowly drawn and
5 not more extensive than necessary to serve New Jersey
6 interests. But it's not. There is a really simple way
7 the State could do this. It could modify it's online
8 permit form for all firearms that includes even BB-
9 guns, you have to get a permit for -- you have to go
10 there and do your online permit form to include a
11 statement regarding concealed carry. Under such
12 circumstances New Jersey cannot force Smith & Wesson to
13 carry the State's message and it cannot survive
14 Constitutional scrutiny.

15 Imagine the implications on both inter-state
16 commerce and speech if the AG's theory were permitted.
17 Every advertisement or promotional statement made by
18 Smith & Wesson, whether by a magazine advertisement,
19 broadcast commercial, tweet, or any other form of
20 advertisement that has the potential to reach the State
21 of New Jersey, which is to say every advertisement
22 would have to have New Jersey's legal disclaimers along
23 with any other applicable State laws. This certainly
24 creates dormant commerce clause issues as we have
25 raised in the federal case and our motion to quash. It

1 would be just entirely too burdensome to meet the
2 purposes. And I will just note that we obviously have
3 not made any of those issues. They're all incorporated
4 into our briefing.

5 This subpoena is a political attack on
6 disfavored speech. This is not about protecting
7 consumers. Even an unbiased journalist recognized that
8 in that New York Times article we cited for Your Honor,
9 calling the AG's arguments disingenuous and the
10 subpoena a Trojan horse. This is about digging and
11 fishing to try to find something to use and it's about
12 chilling his favored political speech.

13 In the first instance, it's our request that
14 Your Honor stay in comity to the First Filed action.
15 But if the Court determines not to stay, because the AG
16 has not met his burden to show his subpoena has a
17 legitimate purpose and because the subpoena cannot pass
18 constitutional scrutiny, then it must dismiss and
19 quash. Thank you, Your Honor.

20 THE COURT: Thank you.

21 MR. SAXENA: Your Honor, I'm happy to respond
22 if that's appropriate now.

23 THE COURT: Yes, I'm just reviewing my notes
24 Mr. Saxena. One moment.

25 (Pause in hearing)

1 THE COURT: I will hear you Mr. Saxena. At
2 the outset I would like to hear you on the argument of
3 Smith & Wesson that there is not basis for your
4 subpoena under the Consumer Fraud Act that the two
5 areas that have been asserted, or two areas of concern
6 that there are statements made by Smith & Wesson that
7 may have an impact on personal safety and/or safety at
8 home, and that certain ads depict and market the
9 concealed carry of firearms while omitting the material
10 fact that in New Jersey concealed carry of firearms
11 requires a permit.

12 So first I'll hear you on whether or not
13 those are the assertions upon which you're attaching
14 your subpoena, or the basis of the subpoena. And then
15 I'll hear you on her argument that those do not
16 properly support your subpoena.

17 MR. SAXENA: Sure, Your Honor. So those --
18 those are the two broad you know bases that are
19 outlined in our papers. And those are the two bases
20 that we are relying on, if I'm understanding correctly.

21 I can go through each of them and explain why
22 each provides a basis for the State to at least
23 investigate under the Consumer Fraud Act.

24 THE COURT: I'll hear you on each of them and
25 then, Mr. Saxena, whatever else you want to add in

1 response to Ms. Saleski's argument.

2 MR. SAXENA: Thank you, Your Honor.

3 THE COURT: You're welcome.

4 MR. SAXENA: So just as a preliminary, as I
5 mentioned the Consumer Fraud Act is one of the most
6 protective consumer protection laws in the nation. And
7 the legislature enacted it as such, and instructed that
8 it should be construed probably as a remedial statute.
9 As part of effectuating that policy and protecting the
10 consumers, the statute doesn't just punish fraud, it
11 punishes or makes unlawful unconscionable commercial
12 practices of a wide variety of conduct, and really
13 seeks to establish a standard of kind of good faith and
14 fair dealing in the market.

15 As another part of ensuring that there's
16 robust enforcement of the statute, the CFA sets up a
17 very broad authority for the Attorney General to
18 actually issue subpoenas for potential violations under
19 the act. Under 56:8-3 the act says, "when it shall
20 appear to the Attorney General that a person has
21 engaged in, is engaging in, or is about to engage in
22 any practice declared to be unlawful by the act, or
23 when it believes it to be in the public interest that
24 an investigation should be made to ascertain that, then
25 he may examine documents and use subpoenas to

1 effectuate that purpose.

2 So the authority is quite broad. So the
3 question then is what is the potential violation that
4 could be an issue. As to -- I'll start with the claim
5 about safety, benefits and effectiveness. Again we're
6 at the subpoena enforcement stage so we're not in a
7 position to weigh out all of the elements of a claim
8 for Your Honor, nor would that be appropriate to
9 disclose all of our investigative thinking and work
10 product to --

11 THE COURT: I'm not asking you to do that Mr.
12 Saxena. I just simply want to hear what the anchor is
13 for the subpoena. Certainly, there's got be some --

14 MR. SAXENA: Sure.

15 THE COURT: -- understanding by the AG of
16 some possible fraud that this broad subpoena power is
17 utilized for. So that's what I want to hear.

18 MR. SAXENA: I -- I think it will help to
19 give you an illustrative example, Your Honor. That is
20 I would just say a hypothetical that is grounded in
21 reality right here. You know, if let's say Smith &
22 Wesson marketed a firearm that -- and it said in an
23 advertisement that the firearm has a "self-defense
24 trigger". And that trigger made that firearm
25 especially effective for purposes of self-defense, and

1 indeed more effective than the competition's firearms.
2 But in fact, you know the actual data in Smith &
3 Wesson's possession indicated that the so-called self-
4 defense trigger did not actually improve the odds of
5 successful use in self-defense and did not render it a
6 superior product when compared to competitor's
7 products. That would be a violation of the CFA. It
8 would be deceptive advertising.

9 Were that to be the case and should we
10 discover those facts that would be an all fours with
11 the Radell case about the football helmets that said
12 that they had new concussion preventative technology
13 when in fact they did not. That was a misleading
14 statement and an advertisement.

15 So that's an example of a variety of
16 statements about products and about the uses of
17 products that Smith & Wesson may be making in it's
18 advertisements, that are misleading as to the safety,
19 effectiveness, or benefits of the products. Those
20 would be statutory violation under the CFA, which
21 prohibits deceptive advertising, and generally
22 misleading statements.

23 THE COURT: But that's not the case here --

24 MR. SAXENA: As to the regulation --

25 THE COURT: We don't have something like that

1 here, do we?

2 MR. SAXENA: Well we do, Your Honor, again
3 without you know, without disclosing our thinking at
4 this stage, we are concerned about statements that
5 Smith & Wesson has made about it's products and their
6 efficacy as compared to other products and their
7 efficacy for purposes of use for self-defense, and for
8 other purposes. This is not a -- as opposing counsel
9 describes, this is not a general inquiry into the
10 appropriateness of firearms for use in self-defense.

11 We obviously understand that firearms have
12 Constitutionally recognized uses for purposes of self-
13 defense. It's an inquiry into the specific statements
14 made by Smith & Wesson in it's advertising about the
15 specific products that it is advertising.

16 THE COURT: So what specific statements and
17 what specific products?

18 MR. SAXENA: So again, that is what -- again
19 our view is it's not appropriate to disclose here,
20 because (a) it's our investigative thinking and our
21 strategy, and (b) we don't have all of the arguments
22 yet, Your Honor. So I've given you an example that is
23 grounded in reality. Smith & Wesson did in fact market
24 a firearm with a self-defense trigger. That has been
25 the subject of prior litigation.

1 But our concerns are also broader than that.

2 And the Attorney General at this stage of the
3 proceeding under the broad authority under the Consumer
4 Fraud Act is entitled to look into these matters.

5 Separately, as to the regulatory violation,
6 you know, it is correct that we did identify one
7 advertisement in our papers. Again, as an illustrative
8 example the bodyguard advertisement which marketed a
9 product, a firearm for purposes of concealed carry.
10 And you know, encouraged consumers, including New
11 Jersey Consumers to purchase the product and use it for
12 concealed carry saying that it was particularly
13 effective concealed carry. And you know, in that
14 instance, again we have concerns that there might be a
15 violation of the regulation. We haven't conclusively
16 determined that yet, nor have we conclusively
17 determined that there's a statutory violation. But at
18 the very least, we're entitled to investigate it in
19 that the advertisement makes no disclosures about you
20 know, the fact that it is unlawful to -- not possess a
21 firearm, but conceal carry a firearm in New Jersey
22 without a permit that is difficult to obtain.

23 Consumers are entitled to this information to
24 get full transparency into what they're buying. And so
25 yes, that -- you know, that is something that we're

1 investigating. Again, we do not have access to the
2 full compliment of Smith & Wesson's advertising. Some
3 of it is public. Some of it is around, but certainly
4 not all of it. And so we're entitled to review it to
5 kind of address these concerns, especially under the
6 broad authority that the CFA provides.

7 And that also, by the way Your Honor,
8 explains some of the requests that Ms. Saleski has
9 pointed out. Do you have a copy of the subpoena in
10 front of you, Your Honor?

11 THE COURT: I have the verified complaint.
12 Does that have the language in it? Let me see.

13 MR. SAXENA: It's also exhibit B to the
14 Vandyke certification that was submitted along with the
15 verified complaint. I'm not sure if you have that.

16 THE COURT: I have it in the electronic file
17 which I've got to pull up. If you want to read
18 language to me, you can do that.

19 MR. SAXENA: Yeah, I can start us off. I was
20 just going to address the concern about some of these
21 requests don't have -- don't go to deceptive
22 advertising, or don't go to a potential CFA violation.
23 I just wanted to walk through some of the key requests.
24 And you know, honestly, I would've preferred to do this
25 at a meet and confer with counsel for Smith & Wesson.

1 This is the type of thing that we would've done. But I
2 think it's useful if we do it here.

3 THE COURT: Yes.

4 MR. SAXENA: The first request, seeks true,
5 accurate, and complete copies of all advertisements for
6 your merchandise, here firearms, that are or were
7 available or accessible in New Jersey concerning and
8 then a variety of topics are listed there, including
9 you know, the benefits of Smith & Wesson firearm.

10 Again that advertisement -- that request
11 seeks the advertisements, right, so we can assess the
12 factual claims that are made by Smith & Wesson about
13 the advertisements.

14 The second request is similar, in that it
15 requests drafts of the advertisements. The reason
16 being if there was language or particular
17 representations that were omitted in early drafts
18 because of concerns that they might be misleading, they
19 may be revealing as to whether Smith & Wesson has made
20 a knowing omission in violation of the CFA.

21 The third request is one that I discussed
22 already concerning tests, studies, and analyses that
23 bear on the factual claims made in the advertisements
24 that are at issue, if those studies illustrate things
25 that are contrary to the representations that are made

1 in the advertising, then that could be evidence that
2 the advertisements are misleading.

3 Request four is the one that Smith & Wesson
4 really focuses on and particularly 4B, out of all the
5 other requests I think they really had an issue with
6 this one. Again, we could've clarified this in
7 discussions with them. But this request was an attempt
8 to seek documents concerning topics that are related to
9 claims that are made in the advertising or types of
10 advertising that we're concerned about.

11 So 4A whether Smith & Wesson firearms can be
12 legally concealed and carried, that goes straight to
13 the regulatory violation, right. We want to understand
14 both the advertisements and also what Smith & Wesson's
15 thinking was if any on making representations as to
16 whether these firearms can be legally concealed or
17 carried by New Jersey consumers.

18 4B is the lifestyle request and I grant that
19 it may be difficult to parse this one if you're not
20 familiar with the types of advertisements here. But
21 Smith & Wesson certainly is and they should know that
22 firearms are increasingly being marketed as lifestyle
23 accessories. Accessories that are not only, you know,
24 suitable for you know, extreme situations like home
25 defense, in the case of an invader, but something that

1 you can carry with you in a purse to Yoga class, or to
2 work, or to you know, a bar, you know which is conduct
3 that is illustrated in advertisements for firearms,
4 because they're being marketed as a lifestyle
5 accessory. So marketing firearms as a lifestyle
6 accessory is directly related to the regulatory
7 violation because it goes to the concealed carry of
8 firearms, which is set forth in this request. Granted
9 it could've been clearer.

10 The rest of the requests in four are
11 similarly, you know, Smith & Wesson is treating them
12 like allegations in a complaint. It's treating them
13 like we are alleging that you know, Smith & Wesson's
14 advertisements assert that a firearm makes the home
15 safer and that somehow is a violation of the CFA. But
16 that's not the intent here. These are topics in a
17 subpoena and we seek to discovery, you know,
18 discoverable information about specific advertisements
19 and specific firearms making specific claims about
20 whether those products will make the consumer safer in
21 specific circumstances.

22 Again, we don't know what those circumstances
23 exactly are yet, because we're at this early stage in
24 the proceeding. But that's where those requests are
25 intended to go. You know, I'll just do requests five

1 and six and wrap this up, because a lot of the other
2 requests are kind of jurisdictional in nature, trying
3 to get a better understanding of the extent to which
4 Smith & Wesson is directing it's marketing into New
5 Jersey and marketing products in New Jersey. We
6 certainly know that they do it. But obviously, we
7 would want to get a better understanding of to what
8 extent.

9 Request five, you know, concerns Smith &
10 Wesson's policies about ensuring compliance with New
11 Jersey laws. That goes directly to the regulatory
12 violation, because we just would like to understand as
13 a background fact whether Smith & Wesson has ever
14 considered this issue of complying with the regulation.
15 And request six, goes similarly like request three, to
16 basically documents in Smith & Wesson's possession like
17 risk assessments that might belie the claims that are
18 made, the factual claims that are made, you know, in
19 its advertising.

20 So I wanted to start there because I thought
21 that might be helpful in terms of bridging the gap
22 between how the parties are characterizing the
23 subpoena. That at least is our view and our intent
24 behind those requests.

25 I'll say as to, you know, a couple of more

1 points and then I will wrap up, Your Honor, we're not
2 saying, you know as -- the important question about
3 timing, you know, is this an appropriate time to
4 consider the Constitutional objections? We're not
5 saying that only McCarthy era cases considered that
6 issue. Smith & Wesson did cite more recent cases
7 involving anonymous individuals on the internet who
8 wished to stay anonymous but a subpoena or other
9 demands sought to identify them and make public their
10 identifying information. But that clearly implicates
11 the same type of associational privacy interest that is
12 addressed in the McCarthy era cases. And it's just not
13 present here. And Local 1814 which Ms. Saleski
14 mentioned, is just directly in the lineage of McCarthy
15 era cases. Although it's more recent, it involved a
16 membership list request for union members that had --
17 that wasn't relevant to the overall investigation and
18 had the risk of chilling conduct.

19 You know, as to the second amendment, you
20 know Ms. Saleski asserted that the DC versus Heller
21 case somehow kind of makes the -- takes the inquiry
22 here under the CFA off the table. That's just simply
23 not the case. I mean Heller did not involve deceptive
24 advertising. It didn't discuss deceptive advertising.
25 In fact the decision expressly acknowledged that

1 reasonable regulation of the commercial sale of
2 firearms is constitutional and does not offend the
3 Second Amendment. So Heller is just off point here.
4 The policy choice, by the way that they were talking
5 about taking off the table in that decision, was a
6 complete and total ban on the possession of handguns in
7 the District of Columbia. That clearly is not what
8 we're dealing with here.

9 On the stay, Your Honor, I would just note --
10 I guess both parties have urged Your Honor to read
11 Sensient Colors if you haven't already, but I would
12 just say read the decision. The Court declines to stay
13 the case there. It cited the Third Circuit case Moses
14 H. Cone which similarly declined a stay because of a
15 preemptive first strike suit.

16 You know, counsel makes that argument that is
17 not forum shopping because there is not an issue of a
18 different geographic forum. But you know, our argument
19 is not that they're trying to take it into a different
20 geographic forum, clearly, they're still in the
21 district of New Jersey. It's just that there are now
22 two parallel proceedings and there's this tricky issue
23 about which is going to go. And the federal
24 proceeding, because they have delays, their request for
25 expedited relief is now going to take months if not

1 years. So it is forum shopping to the extent that they
2 will not have to deal with enforcement of the subpoena,
3 for, you know, extended period of time. Whereas if
4 this Court makes a decision, you know the subpoena
5 might be enforced much sooner.

6 The tolling agreement that they mentioned and
7 the two month delay, so I got to say that argument
8 takes a certain amount of chutzpah because you know,
9 the ordinary course here is that we issue a subpoena
10 and a party comes to us to meet and confer, and at
11 least discuss the objections to the subpoena. But
12 again, here, you know the day after telling us that
13 they are going to refuse to comply with the subpoena in
14 it's entirety, Smith & Wesson went to federal court and
15 commenced litigation. So after that point there really
16 wasn't much to meet and confer about. They kind of
17 missed that opportunity and made clear where they were
18 -- you know, where they were going with this. We had
19 to deal with their requests in the federal forum for
20 emergent relief and understand how it was going to
21 impact this case. So it did take us some time to do
22 that and then get around to actually filing this motion
23 to enforce. But that's not the relevant time period.
24 We didn't sit on our rights. We had one day -- they
25 gave us one day to file a motion to enforce in this

1 Court before they filed in federal court. That's the
2 relevant time period here.

3 So again, I think because of that reason, a
4 stay would be particularly unjust. They say that no
5 prejudice would arise from the delay because there's a
6 tolling agreement. Now while we may ultimately be able
7 to bring claims down the road, let's say months or
8 years because of the tolling agreement, any ongoing
9 violations of law will continue to occur during that
10 time. Of course, we don't know that those are
11 happening, but the subpoena was issued because there's
12 a suspicion that those were happening.

13 So clearly that will be a prejudice to New
14 Jersey consumers. They also complain of a waste of
15 resources, but they can't really be heard to complaint
16 of that, Your Honor, because they are the ones that
17 filed, you know, their Constitutional claims as a
18 complaint in federal court, rather than moving to quash
19 in this Court, which they could've done without the
20 federal complaint. And then there would be no
21 duplicative litigation. So I think that's all I would
22 like to respond now unless you have any other
23 questions.

24 THE COURT: No, thank you Mr. Saxena. Ms.
25 Saleski, is there anything you want to add before we

1 disconnect?

2 MS. SALESKI: Yes, Judge just a few things,
3 thank you. So first on this day, on the timing that
4 argument just doesn't make any sense in light of the
5 time line in the federal action. So we filed on
6 December 15th. The AG asked for an extension of time
7 for 14 days to answer the complaint. Then the parties
8 jointly submitted a briefing schedule on January 21st.
9 Nothing happens in the federal court then until the AG
10 files it's motion to dismiss on February 22nd.

11 In the meantime, on February 12th, that's
12 when the AG files it's state court action. There was
13 actually no emergent or preliminary injunction or TRO
14 request at that time because it wasn't clear that we
15 were -- we needed expedited relief. Then when the AG
16 filed in this Court, we were afraid for our client's
17 rights that they wouldn't get resolved, and that's when
18 the emergent relief was requested.

19 It's correct. It was withdrawn because after
20 that we negotiated a briefing schedule that made sense
21 and made clear that nothing was going to happen in the
22 immediate days that followed. So it's just really not
23 correct, or fair, or genuine to say that somehow that
24 timing there was what capped the filing. Two months
25 was two months and we have to live with those facts.

1 Forum shopping, it's not forum shopping. It's just
2 not. I mean the thing that we just heard described as
3 forum shopping was that it may take months or years for
4 a decision so that's forum shopping. That's not
5 correct. It's just not forum shopping.

6 And also I'll note there's this decision
7 right now pending before the District Court, the
8 briefing is almost finish. The AG just asked for
9 another extension in the District Court to file it's
10 reply. But this is a motion to dismiss and it has a
11 Younger argument to it. We think we have the better of
12 the arguments, because we always do. But we do think
13 we have the better of the arguments, but if the Judge
14 were to grant the relief requested by the AG under
15 Younger grounds that case is over.

16 So it's really -- that we'll know in short
17 order once the AG gets the reply in and it will be
18 fully briefed and I think the Court has said no oral
19 argument on that.

20 This meet and confer issue, you know, going
21 through that subpoena, it strikes me as -- we're
22 talking about opinion issues, and then we're talking
23 about sort of subsets of opinion issues. If we want
24 all of your advertisements that relate to home safety.
25 You know our position on that. That's political speech

1 that is protected and can never be fraud.

2 So to ask for sort of the subset of that
3 then, which is like your drafts of those because we
4 want to know what you were thinking, also violates the
5 Constitution. And under these circumstances where it's
6 clear that the AG is politically aligned, and we were
7 looking -- our client was looking at these document
8 requests and I don't know -- I don't know what this
9 idea is that this one -- that I'm going to come back to
10 in a second is rooted in reality because the AG has not
11 pointed that out to us.

12 But we were looking at these requests and
13 saying what are these, because they did not appear to
14 be rooted in reality for us. That's when we discovered
15 that there's marketing fraud theory, that academics,
16 and people who were opposed to Second Amendment
17 protections have been shopping around to AG's.

18 So if we take the lifestyle one, the idea
19 that they want to get a sense of why we're thinking
20 that somebody should put a gun in their purse when
21 there's this permitting law that we say can't
22 Constitutionally be applied to us just doesn't ring
23 true from our end of it. And I think that the
24 permitting law would not sort of ask the question, why
25 would somebody put that in their purse?

1 You know, it seems more in line with the idea
2 that there was this subpoena that was crafted to get at
3 this political discourse and it's all based in that.
4 So one example that I don't understand how it's rooted
5 in reality, but we can put that away, the one example
6 that the AG gave is self-defense trigger and more
7 effective than others. There's only one request in
8 this whole page that you went through with the AAG that
9 would go to that, and that's 4E. So like 95% of the
10 subpoena does not relate to that. And it's not a
11 concrete this idea that it's rooted in reality, but I'm
12 not going to tell you where. That's not an anchor.
13 And that's what -- that doesn't respond to what the
14 Court was asking for.

15 The repeated statements that somehow the AG
16 has broad authority, that's really not enough. That's
17 not enough under the law. It's not enough in cases
18 like Gibson. Gibson is a supreme court case that
19 recognized that the Constitutionality is not co-
20 expensive with the authority granted by legislation and
21 that makes sense because it's not just about whether
22 you're authorized. It doesn't compel the conclusion
23 that you're free to inquire into any and all demands.

24 So we would ask the Court again to stay. We
25 would ask the Court if you're not going to stay to

1 please consider our request that this complaint be
2 dismissed or that the subpoena be quashed.

3 THE COURT: Okay. Thank you. Thank you both
4 for your very thorough arguments and briefs. I will be
5 considering your arguments. And I will issue an
6 opinion either in writing or else, if I am going to
7 read it into the record, I will notify you 24 hours at
8 least in advance. So thank you both. And good luck.

9 MS. SALESKI: Thank you for your time, Your
10 Honor.

11 THE COURT: You're welcome.

12 MR. SAXENA: Thank you, Your Honor.

13 THE COURT: You're welcome.

14 (Hearing concluded at 11:22 a.m.)

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CERTIFICATION

I, Sharon Conover, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart, Index No. from 10:11:12 to 11:22:43, is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings, as recorded.

/s/ Sharon Conover

Sharon Conover

AD/T 625

AOC Number

Phoenix Transcription LLC

Agency Name

05/30/21

Date